

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

UNIVERSAL INSURANCE COMPANY, a corporation.

Appellant,

vs.

FRANCES M. STEINBACH, also known as
FRANCIS M. STEINBACH, and CAROLYN
S. STEINBACH,

Appellees.

APPELLEE'S BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

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STATEMENT OF THE CASE

By order of the Circuit Court of Appeals, filed May 17, 1948, in this cause, the trial court was required to make three findings: (1) Whether plaintiffs or either of them owned the dredge Wishram or any interest therein; (2) The nature, character and extent of such ownership or interest, if any; and (3) How, when and from whom such ownership or interest, if any, was acquired.

In compliance with this order, the trial court made

its supplemental findings of fact, which were filed in the Circuit Court of Appeals on or about June 24, 1948. A portion of these supplemental findings appear on page 3 of the Appellant's Brief on Supplemental Findings of Fact. The omitted language reads as follows:

"Competitive bids for the Dredge Wishram had not been satisfactory, and the United States Engineers asked the Steinbach brothers to submit a private bid, which they did through Captain Hugh Corgan. The Steinbach brothers furnished Captain Corgan with the purchase price, \$5500.00, part of which they took out of their business, part they borrowed from the bank, and part they borrowed from Francis Steinbach, one of the wives. Captain Corgan received a paper from the Engineers, reading as follows:

'(Letterhead, War Department, Office of the
District Engineer)

6 June 1945.

Captain Hugh Corgan,
2944 N. E. 68th Street,
Portland, Oregon.

Dear Sir:

'Receipt is acknowledged of your certified checks for \$1,000 and \$4,500, full payment for the Dredge 'Wishram' and equipment at the Kruse & Banks Shipyard, North Bend, Oregon.

'Upon presentation of a copy of this letter to the Resident Engineer, U. S. Engineer Office, Empire, Oregon, he will deliver to you or your authorized representative, the property comprising the sale.

Very truly yours,

/s/ HORACE H. PERSON,
Captain, Corps of Engineers,
Executive Officer.'

"This paper Captain Corgan turned over to John Steinbach at once."

The above language was included in the finding by reason of requirement number (3) in the order of May 17, 1948, namely: "how, when and from whom such ownership or interest, if any, was acquired."

Requirements (1) and (2) of the order are satisfied by the final language of the finding, which reads:

"The ownership of the Dredge by Francis and Carolyn Steinbach was complete, subject to working out of the plans aforesaid, and this was fully understood by Captain Corgan, as well as the Steinbach brothers and their wives."

Appellant properly states (page 4, Appellant's Brief): "There is no finding that they had any interest in the Dredge other than ownership."

Concerning the nature, character and extent of the ownership, the trial court held that the ownership was complete in Francis and Carolyn Steinbach. Complete means full and exclusive. Therefore, it must be concluded that Francis and Carolyn Steinbach owned the Dredge themselves with no other person joining, at least, during the time specified in the complaint.

Appellant complains (page 5, Appellant's Brief): "This finding does not recite whether the women held the dredge in common, jointly or otherwise." However, counsel had previously answered his own criticism in Appellant's Brief filed in the Circuit Court of Appeals in March, 1948, by stating on page 45 thereof, "In Oregon there is no joint tenancy of personal property. Dual

or multiple tenancy in personal property is in common.” Therefore, we will concede with counsel that the finding must mean ownership in common, and that joint ownership, could not be legally involved. This criticism, however, we do not feel merits any particular attention.

We find it difficult to follow counsel’s reasoning in the following language appearing on page 54 of Appellant’s Brief:

“ ‘Prior to the purchase of the Dredge, the Steinbachs and their wives conferred about the advisability of making the purchase and operating the Dredge, and it was decided to put the Dredge in the wives’ names, * * * ’

“The District Court also adds in the last paragraph:

“ ‘this was fully understood by Captain Corgan, * * * ’ ”

Counsel seems to believe that this amounted to a finding that Captain Corgan knew about the family conference, as he states:

“There was no evidence that Captain Corgan, knew anything about the family conference, as we will point out later.”

Counsel does comment on the family conference and Captain Corgan’s knowledge of the same on page 9, etc. of Appellant’s Brief. We do not regard Captain Corgan’s knowledge or lack of knowledge of the family conference an important consideration in the proceedings. In the interest of accuracy, however, we feel it is necessary to call this Court’s attention to the fact that

the trial court made no finding to the effect that Captain Corgan knew about the family conference..

The concern of counsel for the Appellant over Captain Corgan's knowledge of the family conference is apparently based upon a misunderstanding of the effect of the final language in the finding of the trial court, namely:

“The ownership of the Dredge by Francis and Carolyn Steinbach was complete, subject to the working out of the plans aforesaid, and this was fully understood by Captain Corgan, as well as the Steinbach brothers and their wives.”

The effect of this language is that what Captain Corgan “fully understood” was that Francis and Carolyn Steinbach had complete ownership of the dredge. Even though the rules of grammar require a conclusion that the clause: “subject to the working out of the plans aforesaid” was part of Captain Corgan's understanding, this language falls considerably short of a finding that he knew anything about the family conference at which the plans were discussed.

Accordingly, we challenge the statement of counsel for Appellant appearing on page 10 of Appellant's Brief, wherein it is stated:

“First let us dispose of the asserted knowledge by Captain Corgan of the family conference. The District Court found ‘this was fully understood by Captain Corgan,’ ”.

Since there was no such finding by the trial court, we find it unnecessary to reply to such portions of the Ap-

pellant's Brief which are based on that erroneous assumption.

Likewise, the statement in Appellant's Brief, on page 10:

"There was no evidence that Captain Corgan knew at the time of the purchase of the dredge that Steinbach Iron Works was in financial difficulties or that they owed money to the president of the First National Bank * * * "

is incorrect. Captain Corgan testified:

"Q. Did Mr. Steinbach say anything more to Mr. Knapp as to why the policy was being issued in the names of the ladies?

"A. Yes, he did. In regard to the condition of the Steinbach Iron Works at that time, he said he did not want it connected in any way with the Iron Works." (Tr. 123).

ASSIGNMENT OF ERROR NO. I

The trial court did not err in finding that Frances Steinbach and Carolyn Steinbach owned the dredge "Wishram." The relevant evidence on this question is as follows:

"Q. Now, at the time the Dredge Wishram was purchased from the Government, or prior to that time, did the Steinbach family have any discussion as to how the title to the Wishram should be taken and held? A. They did.

"Q. Just tell the Court what discussion they had.

"Mr. Snow: If your Honor please, may I have a continuing objection and exception to all testimony of this character tending to show title by parole?

"The Court: It is so understood. Proceed.

"A. Shall I go on?

"Q. (By Mr. Winslow): Go ahead, please.

"A. We met at Dave Steinbach's house, John my husband John, Dave and Carolyn, and we planned on buying this dredge, the Wishram. We talked it over for quite a while and then we decided that Carolyn and myself should have the Wishram, and it was done for convenience.

"The shop had been in the names of John and Dave for years, and we never had had a real good living out of the shop and, so, we thought maybe we could get into something else—if we could get into something else we would have a little bit, maybe we could make a little bit more money that we had in the shop. Not only that, but Dave Steinbach had two boys in the service.

"Q. This was all talked over in the family conference?
A. Oh, yes.

"Q. Go ahead.

"A. We had a boy in the service, too, and we thought we could put this in our names, in the women's names, and then, after it got into working order of some sort, then we would probably turn it over to the boys, or some other affair, but it was not done—it was not to be done until after everything was paid off and was in working order.

"Q. Then, will you say all four of you agreed then to that plan?
A. We did.

"Q. Was that plan ever changed?

"A. Never.

"Q. Have you ladies ever transferred, orally or otherwise, any interest in the Wishram?

"A. Never." (Tr. 175, 176 and 177).

David E. Steinbach testified:

"A. At the time of the purchase of the dredge, my brother, his wife and my wife, we met at our house and talked about what we were going to do when we purchased this dredge here to keep it out of the shop. On account of the financial difficulties there that we had with the Maritime Commission, we did not want to get it mixed up with the shop account, so we had put the insurance in the ladies' names to keep it away from the Iron Works.

"Q. Go ahead and tell what was said.

"Q. (By Mr. Winslow): Go ahead and tell what was said about whether the boat was to be purchased and held by the ladies or not?

"A. I didn't quite get that.

"Q. Tell what was said. What do you mean by keeping it out of the shop?

"A. Well, like I said here a few minutes ago, we were so involved financially with the Maritime Commission and we did not know just how that was going to turn out one way or another, just how long we would have to wait for our money, and we also had loans from two private men there in Tillamook. One happened to be the President of the First National Bank. Like my brother said, every time he went in the First National Bank he wanted to know how soon we were going to pay him back. So, what we did, we thought that would be the best way, if we were going to purchase this dredge, to keep it out of the account of the Steinbach Iron Works account.

"Q. Then what did you agree to do about the ownership of the Dredge?

"A. Well, we agreed to put it in the ladies' names.

“Q. Has that agreement ever changed in any way?

“A. No, it never has.” (Tr. 119-120).

John Steinbach testified:

“A. Shortly after the bids were opened, we received a letter from the Army Engineers asking us to offer a private bid. Previous to this, we had made a tentative agreement on the matter, in case we did purchase a dredge, so, after we received this letter from the Army Engineers, requesting us to make a private bid, my wife and I came up to Portland and met with Mr. Corgan at his home, and he expressed regret that we had not gone ahead with it, for several reasons. He wanted to get back in the dredging business and also make a place for his son who was coming out of the service.

“Going home that night, we talked it over in the car and my wife said, ‘John, I like the idea of Corgan—like the idea that Corgan has of making this business available for his son,’ and we had a son in the service and my brother had two. She said, ‘If you haven’t enough money—if you and Dave cannot raise enough money between you, I have some money that I have saved from teaching and I will loan you some.’

“Q. Was your wife teaching school then?

“A. Well, yes, she was teaching. She was a teacher when we were married and when our oldest son started to college she went back to teaching school.

“We had not received our settlement from the Maritime Commission. They held us up for two years and two months before we got a final settlement, so we owed some bills on these boats and, in order to avoid any complications, we agreed among ourselves—we did not put it in

writing—that we would take on this dredge and the insurance and any other papers would be made out in the wives' names and be held that way until such time as we had our dredging company organized and had it in operation." (Tr. 86-87).

As a result of this family conference, Captain Corgan was authorized to make a bid for the dredge on behalf of the Steinbachs:

"Q. How long have you known the Steinbachs, just generally?

"A. Oh, I would say almost thirty years. I was at first at Yaquina. That was my first connection. That was about 1912.

"Q. What did you have to do with the purchase of the Dredge Wishram in 1945?

"A. I purchased her as agent for the Steinbachs.

"Q. Did you have any financial interest in the purchase at all?

A. I had not ten cents.

"Q. Do you claim any financial interest in the dredge now?

A. I do not.

"Q. Briefly, tell the Court how the purchase of this dredge, the Wishram, was handled by you?

"A. Well, Mr. John Steinbach came to me first, knowing that I was an experienced dredge man, and he put a proposition up to me, asking me if I would be interested as a member of a company, providing he would give me a working interest in it until that part of it was paid and then I would become an owner.

"Q. All of it?

A. A third.

"A. A third?

A. Yes.

"Q. That wasn't quite an answer to my ques-

tion. How was it intended between you and the Government——

“A. Well, I had been with the Government for a number of years and, knowing dredges, he asked me if I would handle the purchase of the dredge.

“Q. Tell what you did in the matter of the purchase of the dredge from the Government?

“A. I went and got the data from the Government Engineers.

“Q. Yes; go ahead.

“A. Then I bought the dredge in—bid the dredge in with the Steinbachs' money and immediately handed over the letter that the Government gave—the Government does not give a deed to any of that property when you bid. They simply give you so many days to get the property away from the mooring, or wherever it is located.” (Tr. 119-120).

ASSIGNMENT OF ERROR NO. II.

The trial court did not err in finding that Frances and Carolyn Steinbach had complete ownership subject to the working out of the unadjusted wartime contract of the Steinbach Iron Works and the contract between the Steinbach brothers and Captain Corgan. Captain Corgan testified:

“A. Well, Mr. John Steinbach came to me first, knowing that I was an experienced dredge man and he put a proposition up to me asking me if I would be interested as a member of a company, providing he would give me a working interest in it until that part of it was paid and then I would become an owner.

“Q. All of it? A. A third.” (Tr. 120).

John L. Steinbach testified:

"A. * * * In 1943 we had a contract with the United States Maritime Commission to build three 65-foot tugs which were delivered to the British Government, and we did general boat repair. We are right on the waterfront and have been doing general boat repair for years.

* * * * *

"Q. * * * In the year 1945 just briefly tell the Court whether or not you were notified the Wishram was being offered for sale?

"A. Yes, we received an invitation to bid on her in 1945.

"Q. At that time what was your relationship with Captain Hugh Corgan?

"A. Well, we had known Mr. Corgan for many years, had business dealings with him, and we contacted him at the time we contemplated making a bid on this dredge, and we entered into a tentative agreement between my brother and Corgan and myself that if the dredge was purchased we would form a company, a dredge company, and engage in the dredge business, and each to have a one-third interest. Mr. Corgan was not able to advance any of the money, but he would take a working interest and pay it out as the dredge paid out." (Tr. 82 and 83).

He further testified:

"We had not received our settlement from the Maritime Commission. They held us up for two years and two months before we got a final settlement, so we owed some bills on these boats and, in order to avoid any complications, we agreed among ourselves—we did not put it in writ-

ing—that we would take on this dredge and the insurance and any other papers would be made out in the wives' names and be held that way until such time as we had our dredging company organized and had it in operation." (Tr. 87).

He further testified:

"Q. When you were in Portland, discussing with Mr. Knapp about the policy, and when you told him to issue the policy in the names of your wives, your wife and David's wife, you did that, knowing that if there was a loss, none of that insurance money would go to the Steinbach Iron Works, didn't you?

"A. Absolutely; didn't want to get mixed up with creditors on this shipbuilding deal.

"Q. Talk louder.

"A. When we got through with the shipbuilding deal, we had \$29,000 coming from the Maritime Commission and we owed \$16,000. These creditors waited twenty-seven months before we could pay them. There was nothing coming there to protect the creditors." (Tr. 100-101).

He further testified:

"A. Well, we tried to carry out the purposes of what we had started out to do when we bought that dredge. We intended to organize a dredging company with Dave Steinbach, Hugh Corgan and myself, to take over this dredge and operate it and, as the dredge earned money, the money that was advanced by the wife would be paid back, and then the dredge would become our property and each one of us would have a one-third interest." (Tr. 105).

The evidence above quoted, together with other evidence in the case, amply supports the finding of the

trial court that the Appellees had complete ownership of the dredge, subject to the working out of the unadjusted wartime contract of the Steinbach Iron Works and the contract between the Steinbach brothers and Hugh Corgan. The assignment of error, therefore, is without merit.

ASSIGNMENT OF ERROR NO. III.

The trial court did nor err in finding that the dredge was transferred to the ladies as a result of the family conference between them and their husbands. On this question, John Steinbach testified:

“Q. The only basis upon which you make any claim that these two ladies owned the dredge was the family conference among members of the Steinbach family? A. That is right.

“Q. Is that right? A. That is right.

“Q. Did Captain Corgan attend this conference?

“A. No.

“Q. The answer is no? A. Yes.

“Q. Then the agreement by which you claim the ladies came to own the dredge was entirely an agreement made, without writing, between the four members of the Steinbach family?

“A. That is right.” (Tr. 103).

His testimony is confirmed by that of David E. Steinbach (see Tr. 112-113), and by that of Frances Steinbach (see Tr. 175-177); therefore, this assignment of error is without merit.

ASSIGNMENT OF ERROR NO. IV.

By this assignment, the erroneous contention is made that the trial court erred in finding that Captain Corgan understood that it had been decided in a conference by the Steinbach family to put the dredge in the wives' names. Since no such finding was made, this assignment is erroneous and misleading. But even though the trial court did not actually find that Captain Corgan knew about the family conference, the evidence does strongly indicate that he had learned what transpired among the Steinbachs. For example, he testified:

"Q. (By Mr. Winslow): You were present when Mr. Steinbach told him to write the insurance in the ladies' names?

"A. Absolutely." (Tr. 125).

He also testified:

"Q. Did you then tell Knapp that the ladies had bought the dredge from the Government?

"A. Mr. Steinbach had this letter from the Government in his pocket and it was Mr. Steinbach who told Mr. Knapp to make the policy out in the ladies' names owing to the fact that he did not want it to be connected with the Iron Works.

"Q. Do you recall definitely now that Mr. Steinbach said anything about connecting the dredge with the Iron Works in Mr. Knapp's office?

"A. Yes.

"Q. He had told you that previously, that he didn't want it connected with the Iron Works, hadn't he?

"A. Oh, yes.

"Q. And you think that he also said, when he was in Mr. Knapp's office, that he did not want it connected with the Iron Works?

"A. He told Knapp to make the policy out to the ladies.

"Q. That it all he told him?

"A. No, it wasn't. He told Knapp at that time his reasons.

"Q. And his reason was that he did not want it connected with the Iron Works?

"A. Yes, and that they had advanced the money." (Tr. 136-137).

Under the title "Index of Main Points of Law, (page 8, Appellant's Brief, on Supplementary Findings of Fact), eight points previously discussed in Appellants' main Brief and Reply Brief have been listed. The purpose of including these points is not immediately apparent. However, it gives us the opportunity to comment on an apparent inconsistency in the Appellant's position appearing at page 5 Appellant's Reply Brief. There the statement appears:

"The Appellees on page 19 of their Brief argue that the 'defense' of the Statute of Frauds is not available to the Appellant. Appellant does not set up the Oregon Statute requiring writing in order to effect transfer of the dredge as a 'defense.' The Oregon statute is only one of many reasons why the Appellees did not own the dredge."

If the Appellant does not in fact rely on the Oregon Statute (Section 2-907, O. C. L. A.) as a defense, it would be interesting to know how it seeks to apply

the Statute in the present controversy. They do state in capitalized print at the top of page 5 of their Reply Brief, "Appellees had no legally enforceable rights in the dredge." We take this to mean that because of the terms of the Statute the Appellees had no right to sue. It makes no difference in the final analysis whether the Statute is invoked because the plaintiff has no cause of action, or otherwise. Called by any other name it still remains the same—a defense to the claim of the plaintiff.

We have previously pointed out, page 19 Appellees' Brief, that the defense of the Statute of Frauds is not available to the Appellant. We wish to cite an additional authority, namely:

Clarke vs. Philomath College et al, 99 Ore. 366,
195 Pac. 822

where it was stated:

"The defense of the statute of frauds is personal, and cannot be interposed by strangers to the agreement. It can only be relied upon by the parties to the contract or their representatives or privies. Like many other defenses, such as usury and infancy, it might be waived. 29 Am. & Eng. Enc. of Law, 807."

If Counsel for Appellant is going to quibble over the word "defense," we wish now to contend that the Statute of Frauds is not available to the Appellant either as a defense or as a means of relying on a supposed weakness in the Appellees' position. If Appellant relies on the Oregon Statute of Frauds (Section 2-907 O. C. L. A.) in any manner whatsoever, it is required to set it

forth affirmatively in its answer, under the Federal Rules of Civil Procedure. Rule 8(c) provides in part:

“In pleading to a preceding pleading, a party shall set forth affirmatively * * * Statute of Frauds * * * and any other matter constituting an avoidance or affirmative defense * * *.”

CONCLUSION

In concluding we wish to comment again on the fact that the principal point of controversy is the insurable interest of the Appellees. We have previously contended that sole and exclusive ownership is not necessary to establish an insurable interest. The trial court has now held that ownership of the dredge was complete in the Appellees. In view of the language found on page 16 of the Appellant's Brief on the Supplemental Findings of Fact we deem it necessary to once again call to this Court's attention the fact that insurable interest does not depend on ownership as such. The truth is that insurable interest may be based on anything short of sole and exclusive ownership as long as the insured will derive pecuniary benefit from the preservation of the insured property or will suffer pecuniary loss or damage from its destruction, termination or injury by the happening of the event insured against.

44 C. J. Section 175

Washington Fire Relief Assn. vs. Albro et al,
137 Wash. 31, 241 Pac. 356.

In *Washington Fire Relief Assn. vs. Albro et al*, supra, The Supreme Court of Washington said:

“It is a rule of law, founded on sound public policy, that one person cannot insure for his own benefit the property of another in which he has no interest. But the husband in this instance was not without the interest. The contents of the barn, at least the hay therein, was the product of the joint labor of both the husband and wife, and was their community property. In this plainly the husband had an interest and could lawfully insure it in his own name for their joint benefit. So, also, we think, he had an insurable interest in the barn, notwithstanding it may have been legally the separate property of his wife. As is shown by the cases collected in 20 C. J. 20, under section 3, the term ‘interest,’ as used in the phrase ‘insurable interest,’ is not limited to property or ownership in the subject-matter of the insurance; that where the interest of the insured in, or his relation to, the property is such that he will be benefited by its continued existence, or will suffer a direct pecuniary loss by its destruction, his contract of insurance will be upheld, although he has no legal or equitable title.”

Accordingly, even though this Court should decide that the finding of the trial court of ownership by the Appellees was in error, nevertheless the evidence definitely shows that they had an insurable interest in the dredge, tested by the rule above announced. In this connection we cite these additional authorities:

Couch Cyclopaedia on Insurance, Vol. I, Section 292.4.

Cooley's Briefs on Insurance, Vol. I, pages 207, 212, 217, 224 and 308.

At the present state of these proceedings, the matter before this Court is a consideration of the propriety of

the findings of the trial court filed with the Circuit Court of Appeals on or about June 24, 1948. We believe there is no responsible evidence at variance with the findings entered by the trial court at that time. Accordingly, we urge that the findings as made and entered and now on file in this court, be upheld.

Respectfully submitted,

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